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IN THE

Supreme Court of the United States

ANDREW S. NATSIOS, SECRETARY OF ADMINISTRATION AND FINANCE OF THE COMMONWEALTH OF MASSACHUSETTS, AND PHILMORE ANDERSON, III, STATE PURCHASING AGENT,

Petitioners,

v.

NATIONAL FOREIGN TRADE COUNCIL,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the First Circuit

BRIEF *AMICI CURIAE* OF CHAMBER OF COMMERCE OF THE UNITED STATES, ORGANIZATION FOR INTERNATIONAL INVESTMENT, NATIONAL ASSOCIATION OF MANUFACTURERS, UNITED STATES COUNCIL FOR INTERNATIONAL BUSINESS, AMERICAN INSURANCE ASSOCIATION, AMERICAN PETROLEUM INSTITUTE, AMERICAN FARM BUREAU FEDERATION, AND CHEMICAL MANUFACTURERS ASSOCIATION IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the U.S. Court of Appeals for the First Circuit correctly held that the Commonwealth of Massachusetts's selective purchasing law targeting commerce with Burma violates the Constitution's Foreign Commerce Clause, unconstitutionally infringes upon the federal government's exclusive authority over foreign affairs, and is preempted by federal Burma sanctions legislation?

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BRIEF *AMICI CURIAE*

Pursuant to Supreme Court Rule 37.3(a on written consent of all parties, the Chamber of Commerce of the United States, Organization For International Investment, National Association of Manufacturers, American Insurance Association, American Farm Bureau Federation, American Petroleum Institute, United States Council for International Business, and Chemical Manufacturers Association, respectfully submit this brief *amici curiae* in support of Respondent.[1]

INTERESTS OF THE *AMICI CURIAE*

Amici curiae are business associations that have substantial common interests in ensuring stable and predictable legal regimes affecting international trade and investment, and in promoting policies that secure for their members and the nation the benefits of free trade. Most of these organizations participated as *amici curiae* on appeal before the U.S. Court of Appeals for the First Circuit. In addition, the Chamber of Commerce of the United States and the Organization For International Investment participated as *amici curiae* in the proceedings before the U.S. District Court for the District of Massachusetts.

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation, representing an underlying membership of more than 3 million U.S. businesses and organizations, with 140,000 direct members, of every size, sector, and region.[2]

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[1] Pursuant to Rule 37.6, *amici* state that no person or entity other than *amici*, their members, or their counsel made any monetary contribution to the preparation or submission of this brief. Further, no counsel for any Petitioner or Respondent authored this brief in whole or in part.

[2] Some members of the Chamber and the Organization For International Investment are also members of Respondent National Foreign Trade Council. Memberships may also overlap among the *amici*.

While most of the country's largest companies are Chamber members, 96% of its members are small businesses with fewer than 100 employees. Chamber members transact business in all or nearly all of the United States, as well as in a large number of countries around the world. Currently, 87 American Chambers of Commerce abroad in 77 countries are affiliated with the Chamber. An important function of the Chamber is to advocate its members' interests in matters of national concern before the courts, the United States Congress, the Executive Branch, and independent regulatory agencies of the federal government.

The Organization For International Investment ("OFII") is the largest business association in the United States representing the interests of U.S. subsidiaries of international companies. OFII's member companies employ hundreds of thousands of workers in thousands of plants and locations throughout the United States. Members of OFII transact business throughout the United States, as well as in many foreign countries, and are affiliates of companies transacting business in countries around the world.

The National Association of Manufacturers ("NAM") is the nation's oldest and largest broad-based industrial trade association. Its nearly 14,000 member companies and subsidiaries, including 10,000 small manufacturers, employ approximately 85% of all workers in the U.S. manufacturing sector and produce more than 80% of the nation's manufactured goods. An additional 158,000 businesses are affiliated with the NAM through its Associations Council and National Industrial Council.

The United States Council for International Business ("USCIB") advances the global interests of American business both at home and abroad. As the U.S. affiliate of the International Chamber of Commerce, the Business and Industry Advisory Committee to the OECD, and the International Organisation of Employers, USCIB officially represents U.S. business positions both in intergovernmental bodies—such as the WTO, ILO, OECD, and U.N. system—

and vis-à-vis foreign business communities and their governments. The USCIB addresses a broad range of policy issues with the objective of promoting an open system of world trade, finance, and investment. The USCIB membership consists of some 300 global corporations, professional firms, and business associations.

The American Insurance Association ("AIA") is a trade association representing more than 300 companies writing property and casualty insurance throughout the United States and around the world. AIA member companies are affiliated with more than 79,000 independent insurance agents in the United States. The purposes of AIA are to promote the economic, legislative, and public standing of its members, to provide a forum for discussion of policy problems of common concern to its members and the insurance industry, and to serve the public interest by participating in litigation that is of significance to the insurance industry.

The American Petroleum Institute ("API") is a non-profit trade association representing over 400 members involved in all aspects of the petroleum industry, including exploration, production, refining, transportation, and marketing. Many of API's members conduct business in foreign countries, and consequently have a direct interest in assuring that access to foreign markets is not unduly restricted by U.S. state and local regulations. In order to ensure that the United States continues to have diverse and ample sources of energy supplies, energy companies must be able to explore new frontiers, and to participate in international trade and investment.

The American Farm Bureau Federation ("AFBF") is an agricultural membership organization formed to represent the business, economic, social, and educational interests of its members which is comprised of Farm Bureaus in all fifty states, Puerto Rico, and nearly 2,800 counties. With a membership approaching five million families, the AFBF is the nation's largest farm organization. Founded in 1919, AFBF's primary activities include lobbying, public relations,

litigation, issue analysis and research, and personal and professional development of member farmers and ranchers. America's farmers have vital interests in the free flow of U.S. agricultural products in foreign commerce.

The Chemical Manufacturers Association ("CMA") is a nonprofit trade association that represents 90% of the productive capacity for basic industrial chemicals in the United States. Exports of chemicals and related products totaled $70 billion in 1999, larger than any other sector in the United States. The industry has a cumulative trade surplus of over $170 billion over the last decade, built on the strength of its role in global commerce.

In aggregate, the organizations filing this brief represent a substantial proportion of all entities doing business in the United States, and, indirectly, much of the U.S. workforce. The *amici* are umbrella organizations charged with representing the legal and policy interests of their members in matters of national import—such as this litigation. The Massachusetts "Burma" statute and other similar state and local economic sanctions laws have had, and if the legal principles recognized by the First Circuit are not affirmed, will continue to have, a serious financial impact on many of the companies represented by the *amici*. Such measures fragment the markets in which *amici*'s members transact the world's business, and undermine the U.S. foreign economic policies on which those markets depend. If unchecked, they will proliferate, not merely burdening *amici*'s members, but harming the country as a whole.

SUMMARY OF THE ARGUMENT

The Commonwealth of Massachusetts has wielded the substantial economic leverage of its $2 billion procurement budget to implement its own foreign policy agenda—with grave and, *amici curiae* contend, unconstitutional consequences for international affairs and foreign commerce.

Specifically, Massachusetts created a blacklist of companies engaged, however remotely, in commerce with Burma[3] and refused to do business with them in an explicit effort to influence patterns of foreign commerce and the domestic policies of the Burmese government. That secondary boycott (an especially powerful and controversial tool of foreign economic relations) necessarily fragments the flow of interstate and foreign commerce. Because of the Massachusetts Burma Law and similar measures—more than twenty additional state and local selective purchasing sanctions, with others waiting in the wings—companies are forced to forfeit either international markets or state and local government procurement opportunities. The proliferation of these measures also impairs the ability of the United States to speak coherently and forcefully in foreign affairs. The Massachusetts Burma Law thus substantially burdens and discriminates against interstate and foreign commerce, and impermissibly intrudes upon the federal government's conduct of foreign relations.

The pursuit of foreign policy objectives, and the impairment of foreign commerce as a means to that end, are not and cannot be among the prerogatives of the several states. The Constitution entrusts the nation's diplomatic and foreign economic relations exclusively to Congress and the President—that is, to *national* policymakers. The U.S. Court

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[3] In June 1989, the Burmese government decreed that the country's name be changed from the Union of Burma to the Union of Myanmar. For convenience, however, this brief refers to "Burma" throughout.

of Appeals for the First Circuit correctly applied the precedents of this Court and upheld this bedrock principle of our system of government. *NFTC v. Natsios*, 181 F.3d 38 (1st Cir. 1999, *aff'g NFTC v. Baker*, 26 F. Supp. 2d 287 (D. Mass. 1998.

Amici curiae respectfully urge the Court to affirm the decision of the court of appeals that states and localities may not enact selective purchasing laws that infringe upon the federal government's authority over foreign affairs, that discriminate against foreign commerce, or that are preempted by federal legislation.

ARGUMENT

I. The Court of Appeals Correctly Decided the Case, Thereby Averting Fragmentation of Interstate and Foreign Commerce and Interference with Foreign Policy

This appeal presents the constitutional questions of whether state and local governments may properly implement their own foreign policy agendas, and whether they may substantially burden not only foreign and interstate commerce but also the entire country's foreign relations in order to do so. *Amici curiae* contend that the court below correctly answered these questions in the negative, and they respectfully urge this Court to do the same.

Before turning to the merits of this appeal, it is important to clarify what this case is *not* about. Specifically, it is not about the propriety of the Burmese government's political and labor practices. To the contrary, *amici* are in full agreement with the Commonwealth of Massachusetts and others[4] that the government of Burma has violated basic political and human rights norms and that its conduct should be condemned. Nor

[4] *See, e.g.*, Brief of Nonprofit Organizations, *Amici Curiae*: Alliance for Democracy, Catholic Foreign Mission Soc. of America, *et al.* at 13-15.

is this case about the propriety of the *federal* sanctions on trade and investment with Burma that have been duly considered and adopted by Congress and the President.

The sole point of contention—and the sole issue in this appeal—is whether the Commonwealth of Massachusetts may impose its own international trade sanctions in order to alter the practices of a foreign government. Massachusetts, like more than twenty other state and local jurisdictions, has opted to implement an independent foreign policy by imposing sanctions (in the guise of selective purchasing) on trade with Burma. Moreover, the state's tool of choice—a secondary boycott—targets not merely the government of Burma, or even Burmese entities, but also any companies with business ties to Burma, and even companies that do no business with Burma at all (but whose corporate affiliates do).[5] These measures endeavor to leverage the state's economic weight into the far reaches of international commerce, and well beyond the scope of Petitioners' stated wish not to contract with dictators.

While the antipathy toward Burmese government practices underlying these sanctions is understandable, in *amici*'s view these laws do grave damage to the free flow of interstate and international commerce, to the federal government's ability to adopt and implement a unified foreign policy, and to the national political process for foreign policy formulation contemplated by the Constitution's framers. Massachusetts has overstepped its authority to legislate in its own citizens' public interest by legislating instead in a manner that affects (and even injures) the public interest of all U.S. citizens in international commerce and in a coherent national foreign policy.

[5] The workings of sections 22G through 22M of Chapter 7 of the Massachusetts General Laws (collectively, the "Massachusetts Burma Law") are described in Petitioners' Brief at 5-7.

The parties in this proceeding have addressed at length the legal issues raised by this appeal. *Amici* believe that the legal arguments invalidating state and local governments' appropriation of the federal authority over foreign commerce and foreign policy are clear and should be beyond question. In this brief, *amici* wish to focus particular attention on the business and economic implications of any contrary determination.

A. Scope of the Problem

This case is not just about the Commonwealth of Massachusetts's Burma Law. The stakes are much higher. Massachusetts is but one of more than twenty sub-federal jurisdictions around the country that as of this writing have already adopted Burma sanctions laws.[6] Others include New York City, Los Angeles, and San Francisco. Additional sub-federal jurisdictions are believed to be awaiting a final decision in this case before moving to adopt sanctions of their own.

Nor is this case solely about laws directed at Burma. In recent years states, counties, cities and other local governments

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[6] County of Alameda, Cal., Alameda County Admin. Code ch. 4.32 (1996; City of Berkeley, Cal., Resolution No. 57000881 (1995); City of Los Angeles, Cal., L.A. Admin. Code, art. 12, § 10.38 (1998); City of Oakland, Cal., Oakland Mun. Code, ch. 2.04 (1996); City of Palo Alto, Cal., Resolution No. 7715 (1997); City of San Francisco, Cal., San Francisco Admin. Code, ch. 12J (1995); City of Santa Cruz, Cal., Resolution No. NS-23,401, City Council Policy No. 29.13 (1997); City of Santa Monica, Cal., Resolution No. 8966 (1995); City of West Hollywood, Cal., Ordinance No. 97-505 (1997); City of Boulder, Co., Boulder Rev. Code § 2-8-11 (1996); City of Takoma Park, Md., Takoma Park Mun. Code ch. 3A (1996); Town of Brookline, Mass., 1997 Town Meeting art. 18 (1997); City of Cambridge, Mass., City Council Calendar No. 26 of June 10, 1996 (Burma); City of Newton, Mass., Ordinance No. V-146 (1997); City of Quincy, Mass., Quincy Mun. Code ch. 2.48.020 (1997); City of Somerville, Mass., Code of Ordinances § 2-386 (1998); Ann Arbor, Mich., Resolution No. R-178-4-96 (1996); City of New York, N.Y., N.Y. Gen. Mun. L. § 103 (1997); Town of Carrboro, N.C., Resolution No. 18/96-97 (1996); Town of Chapel Hill, N.C., Resolution No. 97-1-13/R-16 (1997); City of Portland, Or., Resolution No. 35710 (1998); City of Madison, Wis., Resolution No. 52,471 (1996).

across the country have also considered[7] and/or adopted[8] procurement restrictions and other trade sanctions targeting companies doing business with countries and territories as diverse as Switzerland, China, Saudi Arabia, Northern Ireland, Nigeria, Indonesia, Egypt, Pakistan, Turkey, Sudan, North Korea, Iraq, Morocco, Laos, and Vietnam.

Should this Court fail to affirm the judgment of the courts below, and hold that it is within the authority of sub-federal governments to impose sanctions intended to disrupt U.S. and foreign commerce in order to further their own foreign policy objectives, more such laws will surely follow. There are more than 39,000 sub-federal governments—39,000 states, counties, municipalities, townships, and towns—within the borders of the United States.[9] If the Massachusetts Burma Law is allowed to stand, there is no reason why thousands more might not soon stand beside it.[10]

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[7] *See* OFII, *State and Municipal Sanctions Report* (Jan. 12, 2000), available at <http://www.ofii.com/issues/sanction.html> (listing measures recently before state and local legislators).

[8] County of Alameda, Cal., Alameda County Admin. Code ch. 4.36 (1997) (Nigeria); City of Berkeley, Cal., Resolution Nos. 59000009, 59000107 (1997) (Tibet, Nigeria); City of Los Angeles, Cal., Resolution No. 60 (1998) (Switzerland); City of Oakland, Cal., Oakland Mun. Code, ch. 2.04 (1997) (Nigeria); Dade County, Fla., Resolution No. R-202-96 (1992) (Cuba); Town of Amherst, Mass., A.T.M. art. 43 (1997) (Nigeria); City of Cambridge, Mass., City Council Calendar No. 1 of May 19, 1997 (Nigeria), City Council Calendar No. 91 of July 27, 1998 (Indonesia); City of North Olmsted, Ohio, Resolution No. 97-9 (1998) ("sweatshops"); City of Philadelphia, Pa., Phil. Code § 17-104(b) (1995) (Northern Ireland). *See also* OFII, *State and Municipal Sanctions Report* (Jan. 12, 2000), available at <http://www.ofii.com/issues/sanction.html>

[9] Table 500: Number of Governmental Units, by Type (1997 data, excluding school and special districts), in *Statistical Abstract of the United States* (1999).

[10] State and local sanctions do appear to be proliferating at an increasing rate. While just three such measures were enacted in 1995, eight new laws made their way onto the books in 1996, and 1997 saw the

Moreover, there is no basis for believing that states and localities employing selective purchasing sanctions will confine themselves to targeting the particular abuses in Burma. Already cities have taken it upon themselves to determine, for example, whether Switzerland inadequately compensates Holocaust victims,[11] or whether foreign countries permit "sweatshop" labor practices[12]—and have enacted selective purchasing laws to penalize such foreign governments' shortcomings. *Any* international cause could, with the support of a vocal local constituency, become the impetus for state and local government exercises in foreign policy. One can easily envision selective sanctions targeting companies who do business with particular foreign countries

- whose forestry practices are unsustainable,
- that are not signatories to the U.N. Framework Convention on Climate Change,
- that permit or, alternatively, outlaw abortion,
- that do not conduct democratic elections, or
- that, like the United States, have not signed international conventions on land mines, nuclear test bans, or the proliferation of chemical and biological weapons.

Put simply, there is no logical limit to the range or number of international causes that may be deemed worthy of trade sanctions by a state or locality at any given point in time.[13]

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enactment of fourteen additional sub-federal sanctions. *See* notes 6 and 8 *supra*; *see also* OFII, *State and Municipal Sanctions Report* (Jan. 12, 2000), available at <http://www.ofii.com/issues/sanction.html>. Although this trend abated somewhat in 1998 and 1999, when seven and three new measures were approved, respectively, *see id.*, that shift may very well be attributable to the pendency of this litigation, as well as to the passage of federal sanctions legislation.

[11] *See* City of Los Angeles, Cal., Resolution No. 60 (1998).

[12] *See* City of North Olmsted, Ohio, Resolution No. 97-9 (1998).

[13] The extraterritorial effects of state and local sanctions are most obvious with respect to selective purchasing laws intended to implement

It is also critical to take into account the unique American context in which this question arises. The United States is especially vulnerable to a proliferation of local measures that are targeted at international issues. Our diverse population is drawn from almost as many nationalities and ethnicities as are found on the globe. Though the country as a whole may be a "melting pot," affinity and ethnic clustering remains common at the local level. Clustered local populations with common interests can readily "capture" the attention—and support—of local government. This is all well and good to the extent that the local government restricts its regulatory ambitions to addressing local needs and pursuing local objectives. It is likewise appropriate for local representatives to seek to influence matters of national policy by communicating local views to the appropriate branches of the federal government—where they may be balanced against one another to produce federal action in the *national* interest.

State and local economic sanctions, however, vault local interests directly onto the national stage, causing national consequences without taking national interests into account. If any locally powerful interest group can cause the local government to enact a selective purchasing law to implement a foreign policy agenda, then such laws will proliferate—and their nationwide negative effects will multiply exponentially.

More concretely, this unique American context gives rise to a serious risk of inconsistent local sanctions. One can readily foresee some localities enacting selective procurement laws penalizing one side in, for example, the Middle East or Kashmir controversies, at the same time that other jurisdictions were passing sanctions laws targeting the other

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foreign policy objectives. Efforts to use selective purchasing to dictate public policy beyond a locality's borders are similarly constitutionally infirm, however, when domestic causes are at issue. *See Air Transport Ass'n v. City and County of San Francisco*, 992 F. Supp. 1149, 1155 (N.D. Cal. 1998) (holding unconstitutional local procurement ordinance that sought to regulate its contractors' employee benefits policies regarding same sex domestic partners throughout United States).

side. This Court, in striking down discriminatory state statutes, has explicitly recognized this danger of multiple, inconsistent state regulations.[14]

B. Impact on Companies

Consider the difficulties that just two state or local sanctions laws can create. In 1998, New Jersey proposed to enact prohibitions on procurement from Swiss companies and companies doing business with Switzerland, while Maryland contemplated selective purchasing sanctions against Nigeria.[15] Were those proposals to become law, a company doing business with Switzerland and Nigeria would not be able to do business with New Jersey and Maryland. A company doing business with Switzerland but not Nigeria could do business with Maryland but not New Jersey, and vice versa for a company doing business with Nigeria but not Switzerland. Conversely, a company doing business with New Jersey and Maryland could not do business with Switzerland or Nigeria, and so on.

These complexities mount with each additional state or local sanction heaping on more dizzying permutations, further segregating the U.S. and foreign markets, and adding greater compliance burdens.[16] As the Court recently observed: "Avoiding this sort of 'economic Balkanization,' and the retaliatory acts of other States [and foreign nations] that may follow, is one of the central purposes of our negative Commerce Clause jurisprudence." *Camps Newfound/*

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[14] *See Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 584 (1986).

[15] *See* OFII, *State and Municipal Sanctions Report* (Jan. 12, 2000), available at <http://www.ofii.com/issues/sanction.html> (listing and describing measures recently before state and local legislators).

[16] "Compliance burdens, if disproportionately imposed on out-of-jurisdiction enterprises, may indeed be inconsonant with the Commerce Clause." *Barclays Bank PLC v. Franchise Tax Bd. of Cal.*, 512 U.S. 298, 313 (1994).

Owatonna v. Town of Harrison, 520 U.S. 564, 577 (1997) (citation omitted).

It would be a mistake to underestimate the magnitude of the economic impact that sanctions have on the international business community. These procurement restrictions directly affect billions of dollars a year in business with state and local governments around the country. They are far more than mere symbolic statements or rhetorical flourishes.

The size of the state and local government procurement market underscores the impact of the sanctions. By one estimate, procurement by the fifty states alone totals some $281 billion annually.[17] Other approximations confirm the scale of this market: Almost 40% of the fifty state governments' expenditures,[18] or roughly $335 billion in 1996,[19] went to capital outlays and non-wage payments for current operations—a large proportion of which can be assumed to have reached the private sector through government contracting. Similarly, local governments' capital outlays and non-wage current operations expenditures totaled $396 billion in that same year.[20]

State and local procurement combined, then, may run as high as *$732 billion* each year.[21] And even a single state's procurement budget is formidable: the Massachusetts Burma

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[17] *See* Christopher F. Corr & Kristina Zissis, *Convergence and Opportunity: The WTO Government Procurement Agreement and U.S. Procurement Reform*, 18 N.Y.L. Sch. J. Int'l. & Comp. L. 303, 307 (1999).

[18] *See* Henry S. Wulf, *State Government Finances, 1994* (Table C), in Council of State Governments, *The Book of the States* (1997).

[19] *See* Table 504: All Governments, Detailed Finances 1996, in *Statistical Abstract of the United States* (1999).

[20] *See* id.

[21] *See* id.

Law alone restricts bidding on some $2 billion in state government purchases of goods and services.[22]

On the other side of the equation is the world market, where nearly $6 trillion in trade and investment changes hands each year.[23] Those countries alone that have already been targeted by proposed or enacted sub-federal sanctions[24] do at least $785 billion annually in trade in goods and services.[25]

Because of the Massachusetts Burma Law and other similar measures, companies must choose between these two promising markets. They may operate freely in the world economy, or they may curtail those activities in order to remain eligible for state and local procurement opportunities in the United States. The discriminatory impact on foreign commerce is manifest.

The ramifications for international commerce—and the coercive force—of that choice are readily illustrated by the following hypothetical, but all too plausible, scenario: Imagine that California, with estimated annual state procurement spending in the tens of billions of dollars,[26]

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[22] *See* Joint Appendix at 225.

[23] *See* International Monetary Fund, *International Financial Statistics* 60-61 (July 1998) (1997 total world exports $5.592 trillion, imports $5.463 trillion); International Monetary Fund, *Balance of Payments Statistics Yearbook* 64 (1998) (1997 total world foreign direct investment abroad $419 billion).

[24] *See supra* notes 7 and 8 and accompanying text.

[25] *See Dun & Bradstreet Exporters Encyclopedia* (1998) §§ 2.33 (China), 2.47 (Egypt), 2.78 (Indonesia), 2.93 (Laos), 2.115 (Morocco), 2.117 (Burma), 2.126 (Nigeria), 2.130 (Pakistan), 2.147 (Saudi Arabia), 2.161 (Sudan), 2.165 (Switzerland), 2.175 (Turkey), 2.187 (Vietnam) (imports plus exports for 1995 or 1996).

[26] *See* U.S. Census Bureau, *State Government Finances: 1997*, available at <http://www.census.gov/ftp/pub/govs/state/97st[state postal abbreviation].txt>.

decides to express its opposition to China's Taiwan policies by precluding bidding by companies who (or whose corporate affiliates) participate in China's $290 billion[27] import/export market. Now imagine that the state of Washington reacts to Taiwanese assertions of independence by barring access to Washington's contracts market (roughly $1.3 billion)[28] to all companies with links to Taiwan's $114 billion[29] in international trade. Only two state laws can thus put some $415 billion of commerce into play, to directly contradictory ends, and likely in conflict with carefully calibrated federal foreign policy.

State and local sanctions laws carve up the U.S. and international markets. As the Commonwealth intended, the Massachusetts Burma Law forces companies to choose between doing business with Massachusetts or in Burma. In fact, it reaches even more broadly than that, barring procurement not only from companies that directly transact business with Burma, but also from companies who have *never* done business there—but whose corporate affiliates (however remote, and over which they may have no control) have some minimal economic tie to Burma.[30] The law thus

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California's non-wage expenditures for current operations totaled over $31 billion in 1997.

[27] *See* China: Key Indicators (Feb. 28, 1999) (imports plus exports for 1996), in Economist Intelligence Unit, *EIU Investing, Licensing & Trading*, available in LEXIS, ASIAPC Library, EIUILT File.

[28] Some $2 billion in Massachusetts state contracts were affected by the Burma Law. *See* Joint Appendix at 225. Washington's non-wage current operations expenditures are two-thirds as large as those of Massachusetts. U.S. Census Bureau, *State Government Finances: 1997*, available at <http://www.census.gov/ftp/pub/govs/state/97st [state postal abbreviation].txt>.

[29] *See* Taiwan: Key Indicators (Dec. 30, 1999) (imports plus exports for 1997) in Economist Intelligence Unit, *EIU Importing, Licensing & Trading*, available in LEXIS, ASIAPC Library, EIUILT File.

[30] That is, Massachusetts agencies may not procure goods or services from a U.S. company owned by a multinational parent company that has

presents some companies with no choice at all; their ability to do business with Massachusetts, or the penalty of forfeiting that business, is at the mercy of their corporate parents' and siblings' international business plans.

In this light, it is important to recall that Massachusetts's sanctions and others like them affect not only companies involved in traditional international trade in goods, but those providing services as well. The sweeping reach of these measures is illustrated by the example of financial services: Financial institutions supply a complex array of services, ranging from commercial banking to bond underwriting to pension fund management to insurance. These services are provided to the full range of state entities, that is, not only state agencies but also housing authorities, development corporations, transportation authorities, educational loan entities, etc. In light of the recent U.S. legislation removing statutory walls separating different types of financial institutions,[31] that array of services provided by affiliated companies will soon be even broader. Yet these same financial entities will find themselves on Massachusetts's restricted list for all of those services if any single one of their global affiliates or branches does business in Burma or provides any financial services—from accepting deposits, to providing advice, to acting as a mere escrow agent—to any Burmese government-affiliated entity. *See* Mass. Gen. L. Ann. §§ 22G-22H. Unraveling these global entanglements even to determine whether a financial institution is in compliance with the Massachusetts Burma Law is daunting enough; the havoc wrought by actually implementing a proliferation of sub-federal sanctions is almost unthinkable.

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other, unrelated subsidiaries that allow their goods to be marketed in Burma, directly or otherwise—even though the U.S. company may have no other connection to Burma, and no control over its foreign affiliate's business activities.

[31] *See* Financial Services Modernization Act of 1999, Pub. L. No. 106-102, 113 Stat. 1338 (1999).

Multiplying state and local sanctions regimes give rise to other very practical, if less quantifiable, problems. First, individual companies' competitiveness is harmed: At any moment—whenever yet another state or locality chooses to enact selective purchasing sanctions—*amici*'s members may be forced to make this difficult choice between pursuing international business activities and remaining eligible for U.S. state and local government procurement contracts. As a result, they risk becoming known as unreliable business partners in the eyes of foreign companies and foreign governments, and they suffer a corresponding competitive disadvantage when they attempt to do business abroad.

Second, for even the most sophisticated companies it is very difficult and costly even to track—much less to comply with—sanctions-related developments in all fifty states and the tens of thousands of cities and towns that might be persuaded to act in this arena. Far from being limited to the largest American localities, sub-federal sanctions ordinances have cropped up at all levels across the country. In this light, Petitioners' contention that one should look to Congress (rather than the Constitution) to invalidate sub-federal international trade sanctions rings hollow indeed. It is neither realistic, nor a reasonable extrapolation of the framers' intentions, to suggest that businesses should petition Congress for preemptive legislation each and every time Carrboro, North Carolina or North Olmstead, Ohio elects to impose trade sanctions with respect to a new country or a new international cause célèbre.

As the world's largest market, largest source of outbound investment, and largest haven for foreign investment, the United States has by far the most to gain from an open global economy. It also has the most to lose if the formulation and implementation of foreign and trade policy are hijacked or impaired by sub-federal entities. Likewise, it is U.S. companies—not foreign companies or foreign countries—that have the most to lose if state and local selective purchasing sanctions continue to proliferate. American companies are

among the most globally active, and the increase in U.S. exports has brought remarkable growth to the U.S. economy. The burden of complying with an ever more complex array of local sanctions will fall chiefly upon U.S. companies, who will also be the principal targets of any retaliatory action. Massachusetts and its fellow activist sub-federal jurisdictions thus impair the whole nation's economic affairs.

C. Effects on the Conduct of Foreign Affairs

The Commonwealth of Massachusetts would have this Court believe that the Massachusetts Burma Law merely implements a local purchasing preference, much like a procurement ordinance favoring the purchase of recycled products.[32] In truth, however, this procurement sanctions law is neither so mundane nor so benign. Massachusetts has enacted an economic sanction against a foreign government, has employed a secondary boycott against businesses worldwide, and is using its purchasing laws as a weapon to implement a foreign policy agenda.

It should be clear beyond doubt from a review of the record that both the intent and the effect of the Massachusetts law has been to influence business activities abroad (namely, in Burma) and, through such sanctions, to influence the conduct of the Burmese government. This purpose is reflected

- in the challenged statute itself, which imposes a secondary boycott on companies doing business with Burma without regard to where those companies are located, the level of their business activities in Burma, or the origin of the products to be sold to the state;

[32] At least thirty-eight of the fifty states' purchasing laws accord preferences to recycled products. *See* Table 7.11, State Purchasing: Buy-American Laws and Other Practices (1997 data), in Council of State Governments, *The Book of the States* (1998-99).

- in the statute's legislative history, which clearly evinces the sponsors' intention to pressure Burma to modify its domestic policies;[33] and
- in the broader campaign pursued by sanctions advocates, reflected in companion procurement laws adopted (at this writing) by more than twenty other state and local jurisdictions.[34]

Indeed, the purpose and intended effect of the Massachusetts Burma Law is not merely to burden and discriminate against foreign commerce with Burma, but to halt it entirely. And the means that Massachusetts has chosen to do so—a secondary boycott—is especially pernicious. The Commonwealth has not simply refused to "trade with dictators"[35] in the Burmese government, or to trade with Burmese companies, or to purchase Burmese goods (a primary boycott). It has set its sights on regulating a much broader international market: U.S. and other foreign companies that have any such business ties, however remote or indirect. Indeed, the Massachusetts law even reaches companies that have *never* done business with Burma (but who are related through corporate affiliations with *other* companies who have such ties). United States federal authorities wield the dangerous foreign policy weapon of a secondary boycott with great care, because it brings with it

[33] *See NFTC v. Baker*, 26 F. Supp. 2d 287, 291 (D. Mass. 1998) (discussing legislative history).

[34] *See* jurisdictions listed *supra* note 6. The nature and progress of this campaign have been carefully documented by, among others, the Investor Responsibility Research Center. *See, e.g.*, Investor Responsibility Research Center, *Country-Specific State and Local Selective Purchasing Laws* (1997); Investor Responsibility Research Center, *Multinational Businesses in Burma (Myanmar)* (quarterly report).

[35] Petitioners' Brief at 11.

considerable international turmoil.[36] Massachusetts, however, has deployed this most powerful of international economic sanctions—which the state itself gravely characterizes as a "wise alternative to war"[37]—on its own initiative, apparently heedless of the consequences to the nation as a whole.

Massachusetts enacted its selective purchasing law with a clear and avowed purpose: to punish a foreign government and pressure that foreign government to modify its domestic policies. *See NFTC v. Baker*, 26 F. Supp. 2d at 291 (discussing legislative history). While the Commonwealth's concern for the well-being of the people of Burma is laudable, it is not the state's prerogative to craft and implement its own foreign policy. The conduct of foreign affairs is a delicate responsibility requiring a weighing of *national* interests. That responsibility is committed by the Constitution to the President and Congress.

The Massachusetts Burma Law alone has seriously impaired federal foreign policy and the United States' dealings with foreign governments.[38] As noted, however, that law does not stand alone. It is but one out of some forty enacted or recently proposed state and local sanctions, and only a precursor of the many local foreign policy initiatives sure to follow should this Court not affirm the judgment of the courts below.

Proliferating sub-federal sanctions pose a direct threat to the federal government's ability to conduct foreign policy. This is not merely an academic threat; it is very much a practical one. The scope and magnitude of this danger were

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[36] United States foreign policy representatives must already cope with the international diplomatic fallout of considered *federal* decisions to impose economic sanctions, such as the Cuban Liberty and Democratic Solidarity Act of 1996, Pub. L. No. 104-114, 110 Stat. 785 (1996) (also known as the Helms-Burton Act).

[37] Petitioners' Brief at 29.

[38] *See* Brief of *Amicus Curiae* European Union.

recently outlined by one of the principal architects of the Clinton Administration's foreign economic policy, then-Assistant Secretary of State for Economic and Business Affairs Alan P. Larson,[39] in a speech before the Council of State Governments:

> I am not a lawyer, and I am not here to discuss the questions that have been raised as to the constitutionality of state and local sanctions measures. *I would, however, like to draw on my personal experience to discuss some of the very real ways in which state and local sanctions can disrupt the Executive Branch's conduct of foreign policy:* (1) such measures may clash with Presidential foreign policy initiatives, undermining the ability of the United States to speak with one voice on foreign policy matters; (2) they can complicate efforts to build coalitions with our allies; (3) they can raise allegations of violations of our international legal obligations; and (4) they can have very significant costs for states that are trying to attract investment.
>
> Policy toward Burma illustrates some of these points. Congress and the President carefully tailored the precise measures the federal government would impose in seeking to influence change in Burma. . . . These measures reflect a considered federal government decision not to impose much more rigorous economic sanctions and thereby to maintain some level of economic engagement with Burma in order to further our foreign policy objectives there. . . . *The sanctions called for in the Massachusetts law are very different . . .*
>
> *The Massachusetts Burma law has, in my experience, complicated our ability to build*

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[39] Ambassador Larson currently serves as Under Secretary of State for Economic, Business, and Agricultural Affairs.

> *coalitions with our allies to affect the changes in policy that both we and the sponsors of the Massachusetts statute seek.* We depend on partners like the EU for cooperation in pressing other governments to change policies harmful to our common interests. . . . Although the U.S. continues to push for multilateral cooperation on Burma, the EU's opposition to the Massachusetts law has meant that US government high level discussions with EU officials often have focused not on what to do about Burma, but on what to do about the Massachusetts Burma law . . . . *Based on this experience, it is my judgment that the law has hindered our ability to speak with one voice on the grave human rights situation in Burma, become a significant irritant in our relations with the EU and impeded our efforts to build a strong multilateral coalition on Burma where we, Massachusetts and the EU share a common goal.*[40]

As Ambassador Larson made clear, the proliferation of economic sanctions at the state and local level—however well-intentioned on the part of individual localities—has had significant and harmful consequences for our nation's foreign relations.

In this respect, measures like the Massachusetts Burma Law often do more harm than good to the very causes they hope to promote. By acting in a manner inconsistent with the measures adopted by Congress and the President, Massachusetts has unbalanced the carefully calibrated policy devised by the United States in response to Burma's abuses. It is notable, for example, that Massachusetts's sanction is triggered by the very type of business activity that is expressly

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[40] Assistant Secretary of State Alan P. Larson, *State and Local Sanctions*, Remarks to the Council of State Governments (Dec. 8, 1998) (emphases added), available at <http://ofii.com/resources/legis/remarks.html>.

permitted by the federal law directed at Burma.[41] And by antagonizing U.S. trading partners, the Commonwealth's action has made it more difficult for the United States to win their support and move toward an effective multilateral policy. Massachusetts's unilateral effort to increase pressure on Burma has had the practical effect of *reducing* the international pressure that can be brought to bear on that regime. If sporadic and uncoordinated state and local actions cause the United States to be viewed as unreliable and unpredictable in international affairs, its pleas for collective action—such as collective condemnation of human rights abuses in Burma—will fall on deaf ears.

This burden on the United States' ability to design and conduct a rational, calibrated foreign policy affects more than the niceties of diplomacy. It has very real effects on people and businesses. The people of Burma are worse off to the extent that U.S. policies seeking to aid them are undermined, and to the extent that they do not benefit from the liberalizing effects of trade and investment. The people of the United States are worse off to the extent that Massachusetts's sanctions make the country less attractive to investment by multinational companies. And people around the world are worse off to the extent that soured relations with U.S. trading partners reduce the prospects for market-opening agreements, and for coordinated international economic policies. Furthermore, each additional state and local sanctions law increases the risk of foreign retaliation not just against the offending locality—that is, for example, not just against

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[41] Federal law authorizes the President to prohibit "new investment" in Burma, but expressly excludes from the "investment" definition "entry into, performance of, or financing of a contract to sell or purchase goods, services, or technology." Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 570, 100 Stat. 3009-166 (1997), at § 570(f)(2). The Massachusetts Burma Law, in contrast, is triggered by the sweeping category of "doing business" in Burma.

Massachusetts businesses or Massachusetts products—but against "the Nation as a whole."[42]

Its good intentions notwithstanding, Massachusetts's pursuit of an independent foreign policy toward Burma has imposed a serious—and unconstitutional—burden on foreign commerce and U.S. foreign policy. The consequences of the Massachusetts Burma Law borders of the state that enacted it, and for that reason, cannot be allowed to stand consistent with our federal form of government.

CONCLUSION

For the foregoing reasons, *amici curiae* Chamber of Commerce of the United States, Organization For International Investment, National Association of Manufacturers, American Insurance Association, American Farm Bureau Federation, American Petroleum Institute, United States Council for International Business, and Chemical Manufacturers Association respectfully ask this Court to affirm the judgment of the court of appeals that the Massachusetts Burma Law is unconstitutional. The statute impermissibly disrupts and fragments interstate and foreign commerce, and is an illegitimate intrusion on Congress's and the President's exclusive authority over the foreign affairs of the United States.

Respectfully submitted,

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[42] *Japan Line Ltd. v. County of Los Angeles*, 441 U.S. 434, 450 (1979). The Court has explicitly recognized this danger in its foreign commerce jurisprudence.

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